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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MEAD JOHNSON & CO.,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD CO.,

Respondent.

and

MEAD JOHNSON & CO.,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 15, 1984

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Seventh Circuit Court of Appeals, restricting the "misrouting" exception to the Interstate Commerce Act's requirement of collection of the lawful tariff, should be allowed to stand in conflict with the Eighth Circuit which has followed an ICC established line of cases approving the "misrouting" exception.

PARTIES

All parties to this action are shown in the caption. In compliance with Supreme Court Rule 28.1, Mead Johnson & Company is a wholly owned subsidiary of Bristol Myers Company.

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In The

Supreme Court of the United States

October Term, 1984

MEAD JOHNSON & CO.,

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit, is reported at 737 F.2d 683 (1984) and is printed in the Appendix hereto, *infra*, pages A-1 to

A-13. The judgment, findings of facts, conclusions of law and memorandum of U.S. Magistrate J. Patrick Endsley, serving as trial judge in the United States District Court for the Southern District of Indiana, Evansville Division, is printed in the Appendix hereto, *infra*, pages A-14 to A-36.

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Seventh Circuit, entered on the 20th day of June, 1984. The jurisdiction of this Court is found under 28 U.S.C. §1254(1) as to a petition by a party to a civil case, after rendition of judgment or decree in the Court of Appeals. This Court is requested to review the decisions below under Supreme Court Rule 17.1(a) and 17.1(c) as to a conflict between the Seventh and Eighth Circuits, and because of the need for this Court to clarify and settle an important question of federal law.

STATUTE INVOLVED

The arguments in this matter deal with various sections of the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.*, but specific reference is had to the provisions of 49 U.S.C. §10761 within the context of the Interstate Commerce Commission's decisions defining misrouting exceptions. 49 U.S.C. §10761 reads as follows:

§10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USC §§10501 *et seq.*] shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter [49 USC §§10761 *et seq.*]. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title [49 USC §10101]. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers. (Oct. 17, 1978, P.L. 95-473, §1, 92 Stat. 1394.)

STATEMENT OF THE CASE

This Court is being asked to clarify and settle the federal law on the existence of a misrouting exception to the general rule allowing, even requiring, collection of I.C.C. tariff rates for the travel of goods by rail. As a result of the decision of the Seventh Circuit on this issue,

there now exists a conflict of authority between the Circuits, and clarification of this Court's own decisions is required. Thus, this petition requests this Court to issue Writ of Certiorari under both Supreme Court Rules 17.1(a) and 17.1(c).

This case involves issues as to the collectability of three years of undercharges by the two railroad respondents and whether and the extent to which a misrouting defense to collection exists.

Your petitioner, Mead Johnson & Co., (hereafter "Mead Johnson") manufactures pharmaceuticals in Evansville, Indiana. Included in its line of goods are certain milk food products such as the infant formula Enfamil® and others which Mead Johnson ships nationwide. In the relevant time periods, 1977 to 1980, Mead Johnson shipped to its eastern warehouse located in South Plainfield, New Jersey via both the Louisville and Nashville Railroad Co. (hereafter "L & N") and the Southern Railway Company, (hereafter "Southern"), respondents herein. The volume of shipments could amount to several railroad carloads per week.

Before 1977, Mead Johnson shipped these goods via L & N by a route which traveled from Evansville, Indiana to Chicago (roughly 300 miles north), thence by the Norfolk & Western Railroad to Buffalo, New York, thence Conrail to New Jersey. Mead Johnson experienced some delays, and some physical and freeze/thaw damage to its goods occasionally over this route, although Mead Johnson was being compensated for these loses.

Before proceeding further, the Court should be aware that two types of Interstate Commerce Commission railway tariffs—both legal—exist: rate and route. the route tariffs establish the cost of transmitting goods from one

point to another. Generally speaking, a proposed tariff is submitted by a given railroad traveling the affected route, and subsequently acted upon and approved by the Interstate Commerce Commission. Where more than one railroad would be involved between the point of origin and the point of destination, and the respective railroads involved have agreed to a division of the revenues, a tariff setting forth the route and the rate (with its division among the involved railroads) can be approved by the Interstate Commerce Commission. Where this is done, the route has been said to be an "approved" one, generally resulting in the lowest available rate for transport between these two points. Tariffs showing only the point of origin and the point of destination, without reference to the involved railroads, are thereby published which show the lowest available rates between these points. These have been referred to as rate tariffs. They are also known as "commodity" tariffs, since they are broken down according to the type of goods being shipped: e.g. "milk food products."

The "northern" route thus far referred to was such an "approved" route. In this instance, the rate shown in the commodity tariff would be identical to the rate provided in the approved route tariff.

In early spring, 1977, the L & N approached Mead Johnson concerning different service, over a more southernly route which would avoid the Buffalo exchange yards, considered to be a major source of the damages problem. This new route, referred to in this case as the "southern" route, would carry the goods more directly eastwardly, via the L & N to Cincinnati, Ohio, thence by the Northwestern Railroad to Hagerstown, Maryland, thence by Conrail to New Jersey.

Following a meeting called by the L & N, this new route was presented by the L & N to Marilyn Scales, the rate clerk for Mead Johnson. Ms. Scales was told by her superiors to verify that the new route suggested by the L & N was an "approved" route thereby carrying goods at the same rate as the "northern" route. Being an "approved" route would mean it would carry the lawful rate as shown on the rate or commodity tariffs in the possession of Mead Johnson. The commodity tariffs were generally available. Route tariffs are much more difficult to obtain. As a result, Ms. Scales asked the railroad to confirm the existence of the "approved" route tariff. The railroad was informed Mead Johnson would be unwilling to have its goods travel by the southern route unless this lowest rate would be in effect.

This "approved" status was confirmed by the L & N employees, who then asked, as a service to the L & N, that Mead Johnson place the route and carrier information provided by the L & N, on the bill of lading prepared by Mead Johnson. Trial testimony showed that the regulations require the originating railroad carrier, not Mead Johnson as shipper, to be responsible for preparation of the bill of lading and inclusion thereon of the route, and subsequent rating of the bill of lading.

At about the same time, the other carrier-respondent, the Southern, sought some of Mead Johnson's business. Marilyn Scales provided the Southern with the information on its shipments by the L & N, asking that the Southern confirm the routes as being "approved," moving goods according to the rate (commodity) tariffs in the possession of Mead Johnson. The Southern provided the routes and carriers to be included on the bill of lading by Mead Johnson and confirmed the "approved" status of the route. The Southern had also been informed by

Mead Johnson of its lowest rate preference. As a convenience to the railroad, the Southern requested Mead Johnson place on the bill of lading the route information provided by the Southern.

Mead Johnson's interest in maintaining rate preference was paramount. Later, when the railroads informed Mead Johnson of their incorrect information that the routes were not approved—that the goods could not travel the southern route and maintain the lawful commodity rate shown in Mead Johnson's tariffs—Mead Johnson changed its procedures to allow the goods to travel the northern route, thereby regaining the lowest rate.

Mead Johnson's rate clerk, Marilyn Scales, worked closely with the local freight clerks of the two railroads. She prepared documents referred to in the case as "rate charts" which contained details as to each Mead Johnson commodity being shipped, the destination thereof, and the rate Mead Johnson expected to pay based upon the rate (commodity) tariffs Mead Johnson had. These rate charts were transmitted to the local clerks for each of the railroads who had possession of them whenever they took receipt of bills of ladings prepared by Mead Johnson.

Whenever new rates would come into being because of ICC approved increases, the railroads' clerks would contact Scales at Mead Johnson and request she provide them with the new rate figures. These figures would be provided in the form of updated rate charts, delivered to each railroad in advance of the date the new rates would come into effect. The trial court determined that the railroad clerks utilized these rate charts when rating (i.e. computing the charges) for each shipment.

When the railroads discovered and notified Mead Johnson that the routes they had provided to Mead

Johnson were not, in fact, "approved" or "through" routes, Mead Johnson altered the bills of lading to return to shipment by the lowest (commodity) rate.

Thereafter, two cases for collection of undercharges occurring during the relevant time period were brought in the United States District Court for the Southern District of Indiana, Evansville Division, on the basis of each railroad's allegations of jurisdiction under the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* and 28 U.S.C. §1337 (under commerce regulations). The L & N matter was consolidated with the Southern's matter for trial as each Complaint arose out of similar carrier/shipper controversies and were tried by a consent of the parties before a U.S. Magistrate without a jury on November 30, 1982. A final judgment was entered by the U.S. Magistrate on March 8, 1983 and by the Clerk of the Evansville Division for the Southern District of Indiana on March 9, 1983. The appeal to the Seventh Circuit Court of Appeals was taken from the Magistrate's final judgment pursuant to 28 U.S.C. §1291, and 28 U.S.C. §636(c) with reference to appeals from judgments entered by Magistrates. The Seventh Circuit Court of Appeals heard oral arguments on January 6, 1984, and returned its reported decision on June 20, 1984. The decision may be found at 737 F.2d 683 (1984), and in the Appendix at pages A-1 to A-13.

The trial court found that the billings by the railroads were based upon rate sheets provided by Mead Johnson, but failed to find that Mead Johnson had proven that the route used was essentially provided by the carriers, as in the case of *F. W. Brownyard v. Union Pacific Railroad Company, et al.*, 136 I.C.C. 477 (1927), rec'd. 148 I.C.C. 444 (1928). The second type of misrouting claimed by Mead Johnson—simultaneous transmission of rate and route information—was also not found, as the court

apparently determined these two items must have been simultaneously contained on the same shipping document: the bill of lading. For this second type of misrouting, Mead Johnson was relying upon the doctrine enunciated by the Eighth Circuit Court of Appeals in *Johnson Machine Works, Inc. v. Chicago, Burlington and Quincy Railroad Company*, 297 F.2d 793 (1962). There, the Court held that the placement of both route and rate information on the shipping papers was, in effect, designation by the shipper of two different routes if the rate was not available for the route shown. Under such circumstances, the Court held the railroad had a duty to inquire and determine the preference of the shipper, and if the railroad failed to so inquire, the railroad would only be allowed to collect the rate specified.

Upon appeal, the Seventh Circuit deferred to the trial court on its fact finding that Mead Johnson had not proven, by "clear evidence," that the routes Mead Johnson had placed on the bills of lading were essentially those of the railroads. However, the Seventh Circuit held that because Mead Johnson had provided to the railroads both the rate charts and the routes shown on the bills of lading, this case did fit within the *Johnson Machine Works* exception. But, reasoned the Seventh Circuit, the *Johnson Machine Works* misrouting exception followed by the Eighth Circuit and developed by the I.C.C. is impermissible under this Court's decision in *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915) which deals with the shipper's presumption of knowledge as to the lawful tariff rates.

This matter is now before this Court on Mead Johnson's request for resolution of the conflict between the Seventh and Eighth Circuits.

REASONS FOR GRANTING THE WRIT

A line of Interstate Commerce Commission decisions and the Eighth Circuit Court of Appeals decision of *Johnson Machine Works, Inc. v. Chicago, Burlington and Quincy Railroad Company*, 297 F.2d 793 (8th Cir. 1962) have been uprooted by the Seventh Circuit's decision in this case. In the present atmosphere of gradual deregulation of the nation's railroads, the Seventh Circuit has incorrectly tightened the grip on generally recognized and reasonable misrouting exceptions.

The phenomenon of conflict between shippers and railroad carriers is no stranger to this Court. Perhaps the most commonly cited case on rate/route conflicts is this Court's decision in *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915) which examined Section 6 of the Interstate Commerce Act which then stated:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

This 1915 version of the statute is taken from the *Maxwell* case, 237 U.S. at 94, 35 S.Ct. at 495. The current version of this statute is found in 49 U.S.C. §10761, and reads as follows:

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 U.S.C. §§10501 *et seq.*] shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter [49 U.S.C. §§10761 *et seq.*]. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.
>
> (b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of §10101 of this title [49 U.S.C. §10101]. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

The historically stated reason for this Court's strict interpretation of this statutory language is the avoidance of discrimination in any form. This policy has resulted in extremely harsh results at times, which the cases themselves recognize. See *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919); *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915); *Kansas City Southern Railway Co. v. Carl*, 227 U.S. 639, 33 S.Ct. 391, 57 L.Ed. 683 (1913).

Without violence to the Act in its pre-1978 form, exceptions to the rule requiring collection of the tariff amounts have been created by the Interstate Commerce

Commission and the courts. A brief review of the holdings of these cases is necessary to demonstrate the conflict between the circuits created by the Seventh Circuit in the Appellate decision in this case.

Mead Johnson has extensively relied upon two lines of cases which have defined two "misrouting" exceptions to the general rule that a shipper is conclusively deemed to have knowledge of the applicable tariff.

The first misrouting exception arises where the choice of route is essentially that of the carrier, where the shipper's primary concern was one of a rate, *which was available.* The wellspring of this exception is the rule that a carrier must carry goods over the least expensive available route when no route is specified by the shipper. *Northern Pacific Ry. v. Solum,* 247 U.S. 477, 483, 38 S.Ct. 550, 62 L.Ed. 1221 (1918); *Galveston H. & S.A. Ry. v. Lykes Bros.,* (D.C. Tex. 1923) 294 F. 968, 972. See also *Arco Bag Company v. New York Central R.R. Co.,* 190 I.C.C. 191 (1932). Where incomplete routing instructions are given, the carrier has a duty to ship by the cheapest route. *Fleming & Sons, Inc. v. Gulf, C. & S.F. Ry. Co.,* 187 F.2d 536 (5th Cir. 1951).

However, if a shipper designates a route, it is clear in the law the carrier must carry the goods on that route.

In *F. W. Brownyard v. Union Pacific Railway Co., et al.,* 136 I.C.C. 447 (1927), rec'd. 148 I.C.C. 444 (1928), the Interstate Commerce Commission acknowledged these propositions. It then held one must look to the intent of the parties and where, as was true in that case, the clear intent of the parties was a rate preference, the presumption of route designation by the fact of the route being placed on the bill of lading by the shipper would be overcome. See also *Burley Tobacco Growers Cooperative Asso-*

ciation v. Chesapeake & Ohio Railway Company, et al., 153 I.C.C. 699 (1929) and *Sherwin Williams Company v. Wheeling & Lake Erie Railway Company, et al.*, 238 I.C.C. 49 (1940).

In *Burley Tobacco*, the commission noted as follows, 153 I.C.C. at 730:

> "While as a general rule when a shipper has signed and accepted a bill of lading it is to be presumed that he has directed the routing specified and is bound thereby, nevertheless such an assumption is not conclusive but is rebuttable on grounds other than those of proven fraud or duress. In this case, this assumption has been rebutted, and should be found that the routing applied was in substance carrier's routing. Such a finding is consistent with the equities, if not the strict technical construction of the facts in the case. See *Brownyard v. Union Pacific Railroad Co.*, 136 I.C.C. 447, 148 I.C.C. 444."

The decision in the Seventh Circuit rendered suspect this exception, as will be discussed subsequently.

The second "misrouting" exception was established by the Eighth Circuit in the case of *Johnson Machine Works, Inc. v. Chicago, Burlington and Quincy Railroad Company*, 297 F.2d 793 (1962). It affirmed a rule the Interstate Commerce Commission had been consistently following that it is the duty of the carrier to notify the shipper when shipping instructions cannot be complied with, and "when such failures have resulted in the use of higher rate routes, we have awarded reparation" (to the shipper). *Pioneer Coal & Coke Company v. Chicago, Burlington & Quincy Railroad Company, et al.*, 190 I.C.C. 553 (1932).

In the *Johnson* case, the defendant (shipper) inserted the routing information on the shipping order and was

induced to do so upon the recommendation of both carriers handling the shipment, with assurances that the transit rate it paid at the time of shipment was available on the routing. The Eighth Circuit noted the *Brownyard* decision, *supra*, and further noted that this Court's recognition of long-standing interpretations of the Act by the Commission charged with its enforcement are entitled a great weight and respect. See *New York, New Haven & Hartford R.R. v. Interstate Commerce Commission*, 200 U.S. 361, 401, 26 S.Ct. 272, 50 L.Ed. 515; *United States v. Chicago North Shore & Milwaukee R.R.*, 288 U.S. 1, 13, 53 S.Ct. 245, 77 L.Ed. 583. Where the shipper had expressed to the carrier its principal concern to be the rate, not the route, it would allow the rate to prevail.

The trial court in this case apparently felt that the failure of Mead Johnson to include the rates (which were in fact in the rate charts) on the bills of lading themselves was fatal to Mead Johnson's assertion that its facts fell within the *Johnson Machine Works* misrouting exception. The Seventh Circuit *disagreed* with the trial court and held that Mead Johnson's rate charts "indicated as clearly as possible which rates Mead Johnson claimed. This situation thus appears to be parallel to that in *Johnson Machine Works*, for it should have been clear to the railroads that Mead Johnson was providing inconsistent rate and route information." *Louisville and Nashville Railroad Co. v. Mead Johnson & Co.*, 737 F.2d at 688-689. If the Seventh Circuit had chosen to follow *Johnson Machine Works* in this instance, it would thereby have reversed the trial court's determination that the facts did not meet the *Johnson Machine Works* case, and Mead Johnson would have been vindicated at the Appellate level.

The Seventh Circuit has even indicated that the instant facts in this case and the decision in *Johnson Machine Works* do *not* do violence to the Interstate Commerce Act. Particularly noteworthy was the Seventh Circuit's point that each involved claims for rates which in fact were available:

> "Nonetheless, although the *Johnson Machine Works* exception for inconsistent rate and route information does not appear to undermine the purpose of the statute, it does appear to conflict with the applicable Supreme Court decisions which apply the terms of the Act strictly and *apparently beyond the requirements of its underlying purpose.* (emphasis supplied). Citing *Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Co. v. Fink, Louisville & Nashville Railroad Co. v. Maxwell,* and *Kansas City Southern Railway Co. v. Carl,* all *supra.*

737 F.2d at 689.

The Seventh Circuit finds such misrouting exceptions to conflict with the historically rooted "dominant purpose" of the Act, to prohibit under any guise, preferential treatment in interstate freight rates. The conclusive presumption that the shipper knows the lawful tariff for a given route which this Court has established in furtherance of the Interstate Commerce Act is now the tail which wags the dog.

Now stricter adherence to this rule of law, in the present atmosphere of deregulation, which has been further advanced by the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, to allow competitive forces to act upon the railroad industry is outmoded—performing disservice to the Act and those affected by it. Short of fraud, any amount of negligence by the carriers continues to be protected now, to an even greater degree, by the "perhaps

now dated bogeyman of rate discrimination" (*Louisville and Nashville Railroad Co. v. Mead Johnson & Co.*, 737 F.2d at p. 690).

By its direction and dicta, the Seventh Circuit's interpretation of this Court's precedent does violence to any doctrine of misrouting *except where the carrier is unaware of the route the goods are to take.* See *Louisville and Nashville Railroad Co. v. Mead Johnson & Co.*, 737 F.2d at 690, n.4. Thus *Brownyard, Burley, Sherwin Williams,* all *supra,* and their like now all have questionable viability. The numerous I.C.C. decisions relied upon by the Eighth Circuit in *Johnson Machine Works* would now be without effect in the Seventh Circuit.

Recent legislation dealing with the railroads, the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 and the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, have moved away from this traditional view of the purpose of the Interstate Commerce Act.

Even Section 10761 (49 U.S.C. §10761), the current version of the Act mandating adherence to the tariff rates allows the Commission to grant relief from this section when consistent with the public interest and the transportation policy of §10101 of the Act (49 U.S.C. §10101).

Congressional changes liberalizing the dealings between carrier and shipper obviously must result in a higher accountability of the carriers. An examination of the findings of Congress in the Staggers Railway Act of 1980, *supra,* is a startling revelation of the change in emphasis of its purpose:

FINDINGS

Sec. 2. The Congress hereby finds that—

(1) historically, railroads were the essential factor in the national transportation system;

(2) the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly power by railroads and establish and maintain a national railroad network;

(3) today, most transportation within the United States is competitive;

(4) many of the Government regulations affecting railroads have become unnecessary and inefficient;

(5) nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads;

* * *

(9) modernization of economic regulation for railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation.

49 U.S.C. §10101(a).

These specific findings show that the bogeyman of rate discrimination is indeed "now dated."

Congress has moved the railroads into the competitive marketplace. Those in the competitive marketplace must be governed by rules of law less distorted and protected than under the old Interstate Commerce Act and its cases, and more in line with realistic commercial law.

As the Commission moves into its §10761(b) role considering prospective relief from the effects of 49 U.S.C. §10761(a) and continues to adjudicate existing rate/route conflicts, the Seventh and Eighth Circuits are sending op-

posite signals as to the validity of establishing misrouting precedent.

The express signal of Congress is a retreat from its previous nearly exclusive concern over discrimination, with avowed interest in allowing parties to deal with one another. In the face of this, the Seventh Circuit has retreated to 1915, by strictly following to an unusual degree precedent which even the Seventh Circuit acknowledges to be harsh, outmoded, and unnecessary to the enforcement of the Interstate Commerce Act, as presently constituted.

CONCLUSION

The conflict created between the Seventh and Eighth Circuits disrupts existing I.C.C. precedent which had been able to harmonize the lawful tariff collection requirements of 49 U.S.C. §10761 with instances of misrouting by the carriers. Historic concern underlying strict enforcement of 49 U.S.C. §10761 in the avoidance of rate discrimination has been replaced, by Congress, with interest in deregulating the rail industry, allowing carrier and shipper to come to terms in the competitive marketplace. The rule of law established in the Seventh Circuit by an untimely return to stricter interpretation of rate discrimination conflicts with more recent Congressional action and will produce chaotic regulatory difficulties. This Court should issue its Writ of Certiorari to the Court of Appeals for the

Seventh Circuit to rectify the split of authority between the Circuits and clarify the Supreme Court's precedent as it presently affects the rail industry.

Respectfully submitted,

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September 15, 1984

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-1638

LOUISVILLE AND NASHVILLE RAILROAD CO.,

Plaintiff-Appellee,

v.

MEAD JOHNSON & CO.,

Defendant-Appellant,

and

SOUTHERN RAILWAY COMPANY,

Plaintiff-Appellee,

v.

MEAD JOHNSON & CO.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
Nos. 80 C 254 & 81 C 77—**J. Patrick Endsley,** *Magistrate.*

ARGUED JANUARY 6, 1984—DECIDED JUNE 20, 1984*

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* Pursuant to Circuit Rule 16(e), this opinion has been circulated among all judges of this court in regular active service. No member of the court favored a rehearing *en banc* regarding the availability of the misrouting defense for inconsistent rate and route information in the circumstances of this case and the disagreement with *Johnson Machine Works, Inc. v. Chicago, Burlington & Quincy Railroad Co.*, 297 F.2d 793, 798-99 (8th Cir. 1962).

Before CUMMINGS, *Chief Judge*, PELL and CUDAHY, *Circuit Judges*.

CUDAHY, *Circuit Judge*. Interstate common carriers are required by law to charge their shippers the lawful published tariff for a shipment, 49 U.S.C. § 10761(a), and this rule applies even where the carrier misquotes the applicable tariff to the shipper. This appeal presents issues concerning the vitality of this rule and the scope of the "misrouting" exception to it.

The dispute before us concerns freight charges for approximately 400 rail shipments of "milk food liquid" by defendant Mead Johnson & Co. from its plant in Evansville, Indiana, to its warehouse in South Plainfield, New Jersey. The shipments in dispute were made between 1978 and 1980 through the plaintiffs, Louisville & Nashville Railroad Company ("L & N") and the Southern Railway Company ("Southern").

Prior to 1977, Mead Johnson shipped milk food product from Evansville to New Jersey via Chicago and Buffalo. We shall refer to that route as the "northern route." Along the northern route, L & N took the goods to Chicago, and other lines carried them to Buffalo and on to Mead Johnson's plant in New Jersey. During late 1976 and early 1977, several shipments along this northern route were delayed, and the milk products were damaged by freezing. Representatives of L & N and Mead Johnson met to discuss the problems, and they agreed that Mead Johnson would begin to ship to New Jersey via Cincinnati, Ohio, and Hagerstown, Maryland. We shall refer to that route as the "southern route." At approximately the same time, Mead Johnson began to make some of its shipments to New Jersey on Southern, and those shipments also went along this southern route. All of the shipments in dispute here were made along the southern route.

The problem stems from the fact that the freight tariffs for the southern route differed from those for the northern route. The northern route had an approved com-

modity "rate tariff" under which the several carriers along the route had agreed in advance how to divide the revenues from the shipments they shared. The southern route did not have an approved "rate tariff," so charges for shipments along the southern route should have been the sum of the "route tariffs" for the various segments or legs of the southern route. The applicable route tariff for the southern route was, therefore, higher than the rate tariff for the northern route. Both railroads in this case charged Mead Johnson the lower rate applicable to shipments along the northern route (with its approved rate tariff), when by law the applicable tariff was the higher route tariff for the southern route.[1] The railroads later sued for the difference between the rates, totalling approximately $113,000 for the 400 shipments. After a consolidated trial before a magistrate, the railroads won judgments for the full amounts of the undercharges.

I.

Ancient and exotic laws govern interstate freight charges. A common carrier regulated by the Interstate Commerce Commission may not receive for its services any compensation other than that specified in the applicable tariff, "whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device." 49 U.S.C. § 10761(a).[2] This rule is applied strictly:

> Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation

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[1] The district court described the correct tariff here as "apparently as hard to find as the Holy Grail." This court, after examining the tariffs included in the appellate record, entirely agrees.

[2] The Interstate Commerce Act was revised and recodified in 1978 by Pub. L. 95-473, 92 Stat. 1337, *codified in* 49 U.S.C. §§ 10101 *et seq.* Section 10761(a) does not differ from prior statutes in any way relevant to this case.

> from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & Nashville Railroad Co. v. Maxwell, 237 U.S. 94, 97 (1915). The shipper and the carrier may not agree on any other rate, and if the carrier by mistake charges the shipper at a rate lower than the applicable tariff, the carrier not only may but must sue to recover the difference. *Consolidated Freightways Corp. v. Forty-Eight Insulations, Inc.*, 501 F.2d 1400, 1402 (7th Cir. 1974). That rule applies even if the carrier misquotes the applicable rate to the carrier. "The carrier's right to recover is quite unaffected by the usual limitations on contract actions based on mistake." *Western Transportation Co. v. Wilson & Co., Inc.*, 682 F.2d 1227, 1229 (7th Cir. 1982). *See also Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619, 622 (7th Cir. 1979) (shipper's alleged reliance on misquoted rates not a defense). The reason for this unusual rule, with its sometimes inescapably inequitable results, was Congress' desire to eliminate the secret discounts and preferential treatment for big shippers that were common in the late 19th century. *Id.*, 594 F.2d at 621.

Ordinarily the carrier would be able to recover the rate differences merely by showing, as the railroads here have done, that the applicable filed tariff was higher than the amount actually charged. However, the courts and the ICC have recognized a narrow exception to the sometimes harsh rule that the filed tariff must apply regardless of mistake. Recovery may be denied if the carrier has "misrouted" the shipment. For example, if a shipper asks

a carrier to take a shipment from Endsville to Mudville and does not specify the route between the two, the carrier ordinarily may charge only the lowest available rate between the two towns, even if the shipment actually went over a route carrying a higher tariff. Under those circumstances, the carrier generally has a duty to ship by the cheapest reasonable means available. *Northern Pacific Railway Co. v. Solum*, 247 U.S. 477, 483 (1918); *Johnson Machine Works, Inc. v. Chicago, Burlington & Quincy Railroad Co.*, 297 F.2d 793, 795 (8th Cir. 1962). *See also Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962) (recognizing shipper's cause of action for misrouting).

Mead Johnson has sought to show that the railroads "misrouted" the shipments here by sending them along the more expensive southern route. However, Mead Johnson faces one very formidable obstacle in making that argument. Mead Johnson itself prepared the bills of lading for the shipments here, and those bills of lading all contained route information which specified the southern route. Because Mead Johnson specified the route on the bills of lading, the railroads appear to have simply followed the shipper's instructions by using the southern route, and that cannot be misrouting.

Mead Johnson's rebuttal is two-pronged. It contends first that it included routing information in the bills of lading at the railroads' request and as a courtesy to them. Second, it contends that it always made clear to the railroads that it wanted its products carried by the cheapest route.

Mead Johnson's rate clerk, Marilyn Scales, testified that railroad employees had repeatedly asked that Mead Johnson include the route information on the bills of lading. If this were true, Mead Johnson could have shown that the railroads were responsible for choosing the more expensive route and thus might have misrouted the goods. *See Texas Eastern Transmission Corp. v. Louisville & Nashville Railroad Co.*, 292 I.C.C. 15, 16 (1954) (shipper rebutted presumption that it designated route on bill of

lading); *Sieck & Snediger v. Atchison, Topeka & Santa Fe Railway Co.*, 283 I.C.C. 337, 340 (1951) (same); *Brownyard v. Union Pacific Railroad Co.*, 148 I.C.C. 444, 448 1928) (same). However, there is virtually no documentary support for Scales' contention, for according to Mead Johnson, the relevant documents would have been destroyed under Mead Johnson's document retention policy well before the case was brought. The magistrate who heard the case below did not credit Scales' testimony on this point, and he found that Mead Johnson itself had supplied the routing information. In the complete absence of any undisputed documentary support for Scales' testimony, we cannot say that this factual finding was clearly erroneous. Because Mead Johnson did not establish as a fact that the railroads supplied the route information, we need not decide whether misrouting can be found where the carrier supplies the route information but the shipper is aware of the route. *See infra* note 4.

In Mead Johnson's second line of attack, it insists it repeatedly told the railroads that it did not care which route the goods took, so long as they went by the cheapest route available. According to Mead Johnson, the fact that the bill of lading specifies the route is not conclusive but creates only a presumption that the shipper designated the route, and that presumption may be overcome by "the clear indication on the part of the shipper expressed to the carrier that his principal concern is the rate, not the route." *Johnson Machine Works, supra*, 297 F.2d at 798. *See Brownyard v. Union Pacific Railroad Co., supra*, 148 I.C.C. at 448 ("clear evidence to the contrary" may rebut presumption).

Scales' testimony also supported this claim of "rate preference." She testified that in discussions with L & N leading to the use of the southern route, she and other Mead Johnson employees repeatedly told L & N that the southern route would be acceptable only if the same commodity rate could be preserved. According to her, Mead Johnson was not overly concerned about the delays and damage by freezing occurring on the northern route be-

cause Mead Johnson was receiving full compensation on its claims resulting from those problems. She also testified that in discussions with Southern Railway, Mead Johnson had insisted that it would ship with Southern only if the railroad could assure the same low rate that L & N was charging. According to Scales, representatives of both railroads assured her that the cheaper rate was available on the southern route. Again, her testimony on these points was not supported by any documentary evidence, with the exception of one brief handwritten note about a telephone conversation. According to Mead Johnson, the documents which would support her testimony on this point would also have been destroyed several years ago. The railroads both said that searches of their files did not turn up any of this alleged correspondence.

The magistrate who heard the case in the district court found that the presumption of shipper routing had not been rebutted by clear evidence to the contrary. He wrote that he was "unable to find a preponderance of the credible evidence supporting the proposition that the shipper's only concern was shipping by the lowest rate or that such concern was duly impressed or communicated to the carriers." Those findings are grounded on the documentary evidence in the record, and the evaluation of the rate clerk's unsupported testimony is a task for the magistrate in the first instance. We cannot say that his findings were clearly erroneous. Therefore, we need not decide whether a shipper's clear expression of rate preference can establish misrouting where the shipper is aware of the route. *See infra* note 4.

II.

Mead Johnson argues finally that even if it supplied the routing information, the railroads still misrouted the shipments because they received from Mead Johnson ambiguous or inconsistent route information which they had a duty to clarify. It is clear that Mead Johnson was doing most of the railroads' paperwork on these shipments, including preparing the bills of lading and calculating the applicable tariffs. Scales, the rate clerk who testified for

Mead Johnson, maintained "rate charts" which specified the applicable tariffs for Mead Johnson's shipments of various products from Evansville to points around the country. The rate charts would have saved a great deal of time in calculating the applicable tariffs on repeated shipments.

These rate charts were not only for Mead Johnson's convenience. According to Scales, she delivered these rate charts to both railroads and regularly updated the charts. In fact, when new rates were about to go into effect, the clerks at both railroads called her to find out if she had figured out the new tariffs for them. The railroads relied on Mead Johnson's rate charts to such an extent that the magistrate found that all of the freight bills in this case were based on these rate charts. The railroads would prepare the freight bills merely by comparing the bills of lading, which Mead Johnson prepared, with the rate charts, which Mead Johnson also prepared.

Mead Johnson argues that where a shipper provides both route and rate information, and where that information is ambiguous or contradictory, the carrier has a duty to inquire and clarify whether the shipper prefers the rate or the route specified on the shipping papers. Mead Johnson relies on *Johnson Machine Works, Inc. v. Chicago, Burlington & Quincy Railroad Co.*, 297 F.2d 793, 798 (8th Cir. 1962), which held that where a shipper designated a route and clearly indicated that it claimed a transit rate not applicable to that route, the carrier had a duty to resolve the ambiguity by asking the shipper to choose between the designated route and the claimed rate. There the court reasoned that the shipper's designation of a rate not applicable to the specified route implied the designation of a second and alternative route. The court relied on several ICC decisions holding that the carrier has a duty to clarify ambiguous or inconsistent instructions.[3] Where the carrier breached that duty, it

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[3] *See, e.g., Vernon Lumber Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 281 I.C.C. 789, 791 (1951); *Inland Steel Co. v. Union Pacific R. Co.*, 264 I.C.C. 267, 269 (1946); *Cudahy Packing Co. v. Baltimore & Ohio R. Co.*, 173 I.C.C. 121, 124 (1931).

could charge only the tariff for the cheaper of the two routes thus designated. 297 F.2d at 798-99.

The railroads argue that *Johnson Machine Works* should not apply here because in that case the inconsistent rate and route information were both contained on the same document — the bill of lading. However, it is clear that the court in *Johnson Machine Works* did not rely on that fact, and we do not think that circumstance is controlling — or perhaps even relevant — here. The significant fact in *Johnson Machine Works* was that the shipper had designated a route and at the same time clearly indicated "on the shipping papers" that it was claiming a transit rate which was available between the origin and destination but not applicable to the designated route. 297 F.2d at 798. In the present case the shipping papers themselves did not indicate the rate which Mead Johnson claimed was applicable, but the rate charts provided by Mead Johnson and used by the railroads in preparing the bills indicated as clearly as possible which rates Mead Johnson claimed. This situation thus appears to be parallel to that in *Johnson Machine Works*, for it should have been clear to the railroads that Mead Johnson was providing inconsistent rate and route information.

The railroads argue additionally that application of the *Johnson Machine Works* exception for contradictory information could provide a device for circumventing the clear terms of 49 U.S.C. § 10761(a). We are not persuaded that the exception for inconsistent information would undermine the purposes of the act, at least as the exception would be applied in the circumstances of this case. Mead Johnson claimed on its rate charts a rate that clearly was available between the origin and destination. Indeed, if Mead Johnson had not supplied the route on the bills of lading, it is quite possible that it could have been charged only the lower rate, regardless of which route the goods actually followed. Since in any event the lower rate could have been available, the case before us presents no immediate threat of unlawful rate preferences.

Nonetheless, although the *Johnson Machine Works* exception for inconsistent rate and route information does not appear to undermine the purpose of the statute, it does appear to conflict with the applicable Supreme Court decisions which apply the terms of the Act strictly and apparently beyond the requirements of its underlying purpose. The Court has held that shippers are conclusively presumed to know the filed tariffs applicable to their shipments. *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 581 (1919); *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97-98 (1915); *Kansas City Southern Railway Co. v. Carl*, 227 U.S 639, 653 (1913). *See also Aero Trucking, Inc. v. Regal Tube Co., supra*, 594 F.2d at 621-22. The Court has also said that no equitable defenses can prevent enforcement of the lawful rates, and that no act or omission by the carrier, except for the running of the statute of limitations, can prevent enforcement of the lawful tariffs. *Louisville & Nashville Railroad Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924). *See Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 485 (1939) (equitable considerations not a defense); *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 582-83 (1919). These decisions remain good law. Congress has not amended the Interstate Commerce Act to change the rigid enforcement of tariffs, and the Supreme Court has consistently adhered to these precedents and to the Act's original dominant purpose of precluding under any guise preferential treatment in interstate freight rates. *See Southern Pacific Transportation Co. v. Commercial Metals Corp.*, 456 U.S. 336, 343-44 (1982).

The exception for inconsistent rate and route information therefore appears to conflict with the conclusive presumption that the shipper knows the lawful tariff. Where the shipper provides a route to the carrier and at the same time claims a rate which is not lawfully applicable to that route, the presumption of the shipper's knowledge would seem logically to preclude a claim of misrouting.

We can see no credible way to distinguish the situation of inconsistent rate and route information from one in which both parties agree on a rate other than the lawful rate, regardless of whether the parties are aware of their mistake. It is clear that Mead Johnson and both railroads thought that the lower commodity rate tariff applied to the southern route, and it is clear that all parties were wrong on that score. This circumstance appears to be nothing more than a mutual mistake or misquotation, and the shipper remains liable for the lawful tariff. *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 98 (1915). Mead Johnson's argument regarding inconsistent information has a powerful appeal to equity, but this contention would also seem to apply to any case in which the carrier had juxtaposed the route and incorrect rate information received from the shipper. A broadly defined "inconsistency" exception would quickly swallow the rule that mistake is not a defense in interstate rate cases, for a shipper could protect itself by merely telling the carrier which rate it was claiming. The Supreme Court said in *Maxwell, supra*:

> A misstatement or misquotation of the rate over a given route is one thing; misrouting is a different matter. We do not think that it can be said that there is a "misrouting," in any proper sense, when the route given by the company is that requested by the shipper or passenger.

239 U.S. at 99. We think the exception for inconsistent or ambiguous information must therefore be limited to situations in which the carrier cannot understand the shipper's routing instructions, or where the routing instructions, *without reference to rate information*, cannot be executed as written.[4] Under this view therefore there was no misrouting here.

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[4] Our reasoning here, based on the presumption that the shipper knows the applicable tariff, would appear to extend to situations in which the shipper is aware of the actual route prior to

(Footnote continued on following page)

We recognize the apparent unfairness of this strange result. This construction of the Interstate Commerce Act encourages shippers to be lazy. Mead Johnson is being penalized here for being a knowledgeable shipper who went the extra mile by helping the railroads do their own jobs. However, Congress, in fear of the perhaps now dated bogeyman of rate discrimination, has established a regime of strict adherence to interstate freight tariffs. And the Supreme Court decisions show that the Act is to be enforced rigorously according to its terms. To ensure the achievement of the Act's purposes, the terms in which the Act is framed reach well beyond those purposes. Although the courts have frequently recognized the harshness and absurdity that may result from the strict construction of the Act, Congress has not amended it. The wisdom of the Act's policy of insisting first and foremost upon uniformity of interstate freight rates is not before us,[5] and we are obliged to enforce the Act as written by Congress and interpreted by the Supreme Court.

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[4] *continued*
shipping. If it does extend that far, it would call into question the validity of the misrouting exception where the carrier provides the routing information. *Cf. Brownyard v. Union Pacific R. Co.*, 148 I.C.C. 444, 448 (1928). Because Mead Johnson failed to establish as a factual matter that the railroads supplied the routing information, *see supra* Part I, we need not decide whether the misrouting exception is available where the carrier supplies routing information and the shipper is aware of the route.

[5] Recent legislation moving toward modified deregulation of the railroad industry (involving greater reliance on competitive forces) might suggest the need for a second look at policies requiring strict adherence to filed tariffs. *See, e.g.*, Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895; Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31. Greater rate flexibility, for example, might seem appropriate where competitive forces are at work and monopoly or monopsony power has abated. However, Congress has not yet amended the Act to permit greater flexibility in situations like the one before us, and we are unwilling to engage in deregulation by adjudication.

For the foregoing reasons, the judgments of the district court in favor of plaintiffs Louisville & Nashville Railroad Company and Southern Railway Company are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY,

Plaintiff,

No. EV 80-254-C vs.

MEAD-JOHNSON & COMPANY,

Defendant.

and

SOUTHERN RAILWAY COMPANY,

Plaintiff,

No. EV 81-77-C vs.

MEAD-JOHNSON & COMPANY,

Defendant.

ENTRY

This matter is before the undersigned United States Magistrate for trial on the consent of the parties and reference from the Honorable Gene E. Brooks, United States District Judge. The Court has heretofore entered its findings of fact on plaintiff's complaints pursuant to Rule 56(d) Fed.R.Civ.P. By agreement of the parties the causes were consolidated for trial. Accordingly, the matter was submitted for trial on the affirmative defenses of the defendant on the 30th day of November, 1982. The

transcript of the evidence having been completed and the parties having now filed their post-trial briefs, the matter is now fully submitted and ready for final disposition.

FINDINGS OF FACT

1. The Court attaches hereto its entry of October 28, 1982 and incorporates by reference each of the findings numbered 1 through 9, inclusive, in Cause Number EV 81-77-C and numbered 1 through 14, inclusive, in Cause Number EV 80-254-C as if the same were fully set out herein.

2. The defendant, Mead Johnson & Company, did, in fact, designate that the "milk food" products it shipped along the Cincinnati route as described in the tariff by its preparation of the bills of lading presented to the carriers.

3. Prior to 1977, Mead Johnson & Company was shipping the commodity listed as "milk food liquid" from Evansville, Indiana, to Oak Tree, New Jersey.

4. During all times herein, the defendant did not maintain all of the routing tariffs which could be applicable to the routing of its products throughout the United States. Instead, Mead Johnson & Company did maintain rate tariffs. The rate tariff for this particular destination, for early 1980 as an example, would have been arrived at as follows:

> A. Rate Basis: The first step in computing the rate to be applied to a shipment from Mead Johnson & Company to Oak Tree, New Jersey was the consultation of the National Rate Basis Tariff 1-B to find the ultimate destination listed. Since Oak Tree, New Jersey was not a specifically rated destination, consultation in this directory gives the information as

to the city which does provide the rate basis. "Exhibit C" is the National Rate Basis Tariff 1-B, as to its page 168. In the left hand column where the asterisk is shown, Oak Tree, New Jersey gives as its rate basis the town of New Brunswick, New Jersey. New Brunswick would hereafter be referred to in arriving at the rate computation.

B. Freight Tariff E-1009-A is next consulted to obtain the actual rate basis applicable between Evansville, Indiana and New Brunswick, New Jersey. Looking at page 123 of "Exhibit D-2", under the column for Evansville, Indiana, and the row for New Brunswick, New Jersey, it can be seen that the rate basis applicable is the number "912."

C. By examining "Exhibit 5", Freight Tariff E-697-E for "canned or preserved food stuffs" and page 26 through 28, it can be seen that the milk product being shipped by Mead Johnson & Company is listed under item number 400. When this Exhibit was originally published in 1968, for rate basis 912, the rate would be 74¢ per 100 pounds in shipments of 100,000 pounds or greater as can be seen at page 55 of "Exhibit E-2."

D. "Exhibit 6" is the Supplement 220 to Tariff TEA-4392, which is the updated rate information applicable in the beginning of 1980. Page 84 of that supplement is shown as "Exhibit 6." By reference to the row indicating a rate basis from 901 to 925, in reading across the page to the column covering 120,000 pounds to 144,000 pounds, and under the middle column of that section, (shown with the number 44 in parentheses) the applicable rate for shipment of this milk product is 213, indicating $2.13 per 100 pounds. It was upon these tariffs that Mead Johnson prepared the rate charts which are "Group Exhibit G" (by Stipulation).

5. From time to time, these rates were increased, and newer rates were in effect.

6. "Exhibit G" contains an example of rate charts prepared by Marilyn Scales, an employee of the defendant.

7. Whenever a shipment was initiated by Mead Johnson & Company during this time period, Mead Johnson & Company prepared a bill of lading for the railroads. Based upon this rate chart and the weight shown in the bill of lading, the railroads issued prepaid freight bills. As an example, a typical copy of an L & N bill of lading for the time period of January 3, 1980, is shown herein as "Exhibit I", while the corresponding prepaid freight bill is shown herein as "Exhibit J." The route on the bill of lading can be seen at the top as "LN-CINN-NW-CR" which stands for Louisville & Nashville to Cincinnati, exchanged there to the Norfolk & Western Railway to its exchange with Conrail. Note that the rate for this item is 213, as per "Exhibit G", page 4, found in the right-hand column entitled "Oak Tree, N.J." The "120" refers to at least a 120,000 pound shipment and the "213" refers to $2.13 per 100 pounds.

8. Both railroads billed on the basis of these rate sheets which were provided by Mead Johnson & Company, and the payment made by Mead Johnson & Company, were on this basis. In the attachment to each plaintiff's complaint (with the exceptions of the errors), the amounts actually paid by Mead Johnson & Company were those that were computed by each railroad from the rate specified by Mead Johnson & Company on these rate charts, before and at the time of the shipments.

9. The bills of lading prepared by Mead Johnson & Company did not contain any *rate* information.

10. The "rate charts" prepared by Mead Johnson & Company did not contain any routing information.

11. Neither the carriers or Mead Johnson & Company made an effort to consult the routing tariffs necessary for a complete determination of the applicable tariff amounts for shipments during the time period relevant to this action.

12. The rating sheets prepared by defendant were in error.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of each action herein, pursuant to 28 U.S.C. §1337, *et seq.*

2. In the matter of *Louisville and Nashville Railroad Company v. Mead Johnson & Co.*, Mead Johnson is liable to Louisville and Nashville Railroad Company in the amount of Eighty-Seven Thousand Two Hundred Eighty Dollars and Twenty-Four Cents ($87,280.24).

3. The law in this matter is in favor of plaintiff, Louisville and Nashville Railroad Company, and against defendant, Mead Johnson & Company, on its complaint.

4. The law in this matter is in favor of plaintiff, Southern Railroad Company, and against defendant, Mead Johnson & Company, on its complaint.

5. Mead Johnson & Company is liable to plaintiff, Southern Railroad Company, in the amount of Twenty-Six Thousand Three Hundred Thirteen Dollars and Fifty-Five Cents ($26,313.55).

6. The law is with the plaintiffs and against the defendant, Mead Johnson & Company on its affirmative defenses.

7. If necessary to sustain the judgment herein, any Finding of Fact shall be construed to be a Conclusion of Law and any Conclusion of Law a Finding of Fact.

MEMORANDUM

From the recent volume of tariff cases in the District and Appellate Courts, it appears the common carriers of our country have suddenly discovered their duty to audit bills of lading and, perhaps, even to perform their own work. *See, Western Transportation Co. v. Wilson & Co., Inc., et al.*, 682 F.2d 1227 (7th Cir. 1982); *Western Transportation Co. v. EI DuPont de Nemours and Co.*, 682 F.2d 1233 (7th Cir. 1982), *Western Transportation Co. v. Webster City Iron & Metal Co.*, 657 F.2d 116 (7th Cir. 1981). As stated by Judge Posner in *Wilson*, at 1227:

> A common carrier regulated by the Interstate Commerce Commission may not receive a different compensation for its services from the rate specified in the applicable tariff, 49 U.S.C. §10761(a), and if by mistake it charges a lower rate it may sue under 28 U.S.C. §1337 to recover the undercharge. *E.g., Madler v. Artoe*, 494 F.2d 323 (7th Cir. 1974). The carrier's right to recover is quite unaffected by the usual limitations on contract actions based on mistake. 'The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate . . . [and] thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor.' *Louisville v. Nashville R.R. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *see also, Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1361 (D.C. Cir. 1980).

This is, indeed, a harsh rule rooted in the abuses of 19th Century secret deals and discounts to big shippers. It follows that the tariffs are literally etched in stone and enforceable regardless of the equities of the parties, the negligence of the carrier or even, as here, the abandonment of their duty to correctly calculate the charges due.

The routing tariff herein was apparently as hard to find as the Holy Grail. The numerous cases cited by both parties support the proposition that the agents of the carrier can misquote, short an intent to defraud, and still the carrier is entitled to recover as the shipper is conclusively presumed to know the tariff. *Louisville & Nash. Ry. v. Maxwell*, 237 U.S. 94 (1915).

With this historical background, the Court must evaluate the defendant's evidence in support of the lowest rate/misrouting exception set out in *F.W. Brownyard v. Union Pacific R.R. Co.*, 148 I.C.C. 444 (1928). The defendant has failed to prove the *Brownyard* exception. Unlike *Brownyard*, there is no correspondence to support the defendant's contentions that the salespeople and agents of the carrier chose the route or indicated that the route designated carried the lowest rate.

Defendant's personnel were not unfamiliar with rate or routing provisions. The rating clerk had been employed in the transportation department since about March, 1968 and had been the rail rate clerk since December, 1976. She had three years of experience prior to joining defendant's company and had attended classes in advanced transportation and traffic management at Evansville College. The testimony convinced the Court that the rate clerk was familiar with the transportation business including routing and rates tariff and, in fact, was performing numerous tasks that should have been performed by

the carrier. Defendant asks the Court to ignore the documentary evidence supporting more than four hundred (400) shipments and accept the unsupported oral testimony of the rate clerk that the railroad "made me do it." This we are unable to do.

Unlike *Brownyard* the carrier did not prepare the bill of lading. Unlike *Brownyard* the shipper was not unfamiliar with tariffs. Unlike *Brownyard* this was not a one-time shipment of potatoes but a pattern of shipments over a two (2) year period. Again, unlike *Brownyard*, the presumption of shipper routing on the bill of lading has not been rebutted by clear evidence to the contrary. 148 I.C.C. at 448, 449. Other considerations in the routing decision are clearly inferred from the difficulty arising out of the double switching at the Evansville yards and the damage to shipments caused by freezing in 1977.

Not only did the shipper prepare the bills of lading indicating the route but they prepared and furnished to the carrier a rate sheet or card indicating the applicable rates. This sheet was revised on at least one occasion to reflect increases in the tariffs. The carrier, contrary to its duty, simply used the information furnished to it in rating the bills of lading. Obviously, if it would have done its assigned duty, these errors would not have occurred or at least would have been caught at an early date.

We are unable to find a preponderance of the credible evidence supporting the proposition that the shipper's only concern was shipping by the lowest rate or that such concern was duly impressed or communicated to the carriers. Herein, we have, at most, a case of misquotation.

Accordingly, the affirmative defense must fail and judgment entered in favor of the plaintiffs in each of the consolidated actions.

Dated this 8th day of March, 1983.

/s/ J. Patrick Endsley
Magistrate
United States District Court
Southern District of Indiana

Copies:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY,

Plaintiff,

No. EV 80-254-C vs.

MEAD JOHNSON & COMPANY,

Defendant.

ORDER

This cause comes before the undersigned United States Magistrate pursuant to the provision of 28 U.S.C. §636(b)(1), upon consent of the parties and reference from the Honorable Gene E. Brooks, United States Distict Judge, on the cross-motions of the parties for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure and Rule 10, Rules of the United States District Court, Southern District of Indiana. The matter was submitted on the pleadings, interrogatories and answers thereto, affidavits, exhibits and briefs of the parties. The Court, being duly advised in the premises, now submits its ruling:

The matter is before the Court on the complaint of the plaintiff, Louisville and Nashville Railroad Company, against the defendant, Mead Johnson & Company, for underpayment of freight charges on certain shipments of "milk food liquid" from Evansville, Indiana to Oak Tree,

New Jersey, between the months of January, 1978 and April, 1980. The parties agree that the facts stated by the plaintiff and the amount in question are uncontested but assert that they have no liability therefor because the plaintiff's misrouting the shipments after assuring defendant that the Chicago-Suspension Bridge rate was the same as the Cincinnati-Hagerstown rate. The parties have each supported their legal and factual position with excellent briefs. The Court, being duly advised on the premises, now finds that there is a genuine issue of material fact herein and that summary judgment must be denied.

The Court further finds that the defendant has submitted the affidavit of Marilyn Scales, freight consolidator and rate clerk of Mead Johnson & Co., during all times herein and which state facts concerning the desire and intention of defendant to maintain the lowest available rate for rail shipments between the points in question regardless of the routes available. That defendant had no preference as to routing but was solely concerned with the lowest rate. The Court finds the assertion to be a material fact herein, which, if proved, could affect the outcome of plaintiff's cause of action. That such assertion is disputed by plaintiff thus creating a genuine issue of material fact.

Pursuant to Rule 56(d) the Court makes the following findings of fact based upon the parties' statements of uncontested facts:

1. Findings of Fact.

1. Plaintiff is a corporation organization and existing under the laws of the State of Kentucky, and having its principal offices and place of business in the City of Louisville, Kentucky.

2. Plaintiff is a common carrier of goods by rail operating in interstate commerce at rates set by the applicable tariffs filed with that agency.

3. Defendant is a corporation organized and existing under the laws of the State of Delaware, and having its principal offices and place of business in the City of Evansville, Indiana.

4. On the various dates between January 3, 1978 and April 11, 1980 set forth in the schedule attached to plaintiff's complaint filed herein, marked "Exhibit A" thereon, and incorporated therein by reference thereto, defendant tendered to plaintiff for shipment by rail in interstate commerce between Evansville, Indiana and Oak Tree, New Jersey, certain goods which constituted "canned, preserved or prepared foodstuffs" within the meaning of the applicable tariff, the Eastern Canned Goods Tariff Freight Tariff E-679-E (1977).

5. Plaintiff accepted and shipped such goods at defendant's request.

6. The tariffs attached to the Affidavit of R. W. Parsons, Jr., the Assistant Manager-Commerce for the Louisville and Nashville Railroad Company, are true and correct copies of the tariffs specified by Freight Tariff E-697-E, and such tariffs were in effect at all times material.

7. For tariff rating purposes, "milk food" is contained in the description "canned or preserved foodstuffs" as shown in Item 400 of Trunk Line-Central Territory Railroads Tariff Bureau Freight Tariff E-697-E, I.C.C. C-718.

8. By use of the above-mentioned tariff, one obtains the lowest applicable freight charge on the tariff here involved if defendant did, in fact, request shipment by plaintiff of

its "milk food" products along the route described as the L&N Cincinnati, Ohio, N and W Hagerstown, Maryland, CR or L&N Cincinnati, Ohio N&W-CR Route.

9. Freight Tariff E-697-E provides in Item 1000, routing instructions located at CTRTB Routing Tariff 662-A, I.C.C. 4595 (Hinsch Series).

10. Freight Tariff 662-A outlines further instructions that tariff users must follow in determining applicable routes and traffic from Evansville, Indiana, to Oak Tree, New Jersey, the route and destination requested by defendant. Page 17 of Section 2 of Tariff 662-A determines the route number specified to be Route Number 542, which Route on page 108 of Tariff 662-A specifies the applicable tariffs to be GFO Number 1047-B, I.C.C. A-16748.

11. Reference to GFO Number 1047-B, pages 5 and 78, indicate the origin group numbers for shipments originating in Evansville, and pages 17 and 45 of GFO 1047-B indicate the destination stations applicable to the destination points specified by defendant.

12. GFO 1047-B also specifies on page 82, Item 15, the application routes to intermediate destinations, which destination of Oak Tree, New Jersey is an intermediate point located between Clark, New Jersey and Metuchen, New Jersey.

13. Pages 79, 6, 7 and 122 show the potential routes applicable to the origin and destination points specified by defendant.

14. That the amount of undercharges indicated for the shipments upon the "Exhibit A" attached to plaintiff's complaint filed herein, and by reference incorporated therein, would be, after adjustments specified in defendant's answers to interrogatories and in plaintiff's "Ex-

hibit 4" attached to the affidavit of R. W. Parsons, Jr., the amount of Ninety-Five Thousand Two Hundred Fifty-One Dollars Seventy-Three Cents ($95,251.73). That the sum due after audit is Eighty-Seven Thousand Two Hundred Eighty Dollars and Twenty-Four Cents ($87,280.24).

This cause shall proceed to trial on the contested issues only.

Dated this 28th day of October, 1982.

/s/ J. Patrick Endsley
Magistrate
United States District Court

MEMORANDUM

The defendant has raised a material issue of fact, to-wit: Whether the plaintiff, Railroad, has misrouted the shipments by instructing the defendant, Mead Johnson, that the same rate was available for the "northern" route as for the "southern" route as defined by the briefs, and that the rate and not the route was the primary concern of the shipper and that such defense, if proven, could defeat the right of the plaintiff to recover herein. See, *Johnson Machine Works, Inc. v. Chicago, Burlington and Quincy Railroad Company*, 297 F.2d 793 (8th Cir. 1962) and as distinguished in *Consolidated Freightways Corporation of Delaware v. Forty-Eight Insulations, Inc.*, 501 F.2d 1400 (7th Cir. 1974).

The standard of review for a motion for summary judgment was clearly set out by the United States Circuit Court of Appeals for the Seventh Circuit:

> While Rule 56 does contemplate that 'the allegation of fact in the pleadings may be pierced' by admis-

> sions, depositions and affidavits which show, in fact, that no genuine issues of fact exist. Unless such evidentiary matters submitted in a particular case clearly show 'that there was no issue of fact to be tried', the Court 'is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings.' If, upon the proofs adduced in support of a motion for summary judgment, any doubt remains as to the existence of a genuine issue of material fact, such doubt must be resolved against the movant for summary judgment and the motion for summary judgment must be denied. (Citations omitted.)

Moutoux v. Gulling Auto Electric, Inc., 295 F.2d 573 (7th Cir. 1961).

Clearly, Fed.R.Civ.P. 56 requires more than persuasive evidence. As a practical matter, the rule requires the absence of evidence to the contrary of the movant's evidence. In summary judgment procedure, it is not the province of the trial court to weigh the evidence of one party against the other; rather, the duty of the trial court is to determine whether factual controversies exist.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

SOUTHERN RAILWAY COMPANY,

Plaintiff,

No. EV 81-77-C vs.

MEAD JOHNSON & COMPANY,

Defendant.

ORDER

This cause comes before the undersigned United States Magistrate, pursuant to the provision of 28 U.S.C. §636(b)(1), upon consent of the parties and reference from the Honorable Gene E. Brooks, United States District Judge, on the cross-motions of the parties for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure and Rule 10, Rules of the United States District Court, Southern District of Indiana. The matter was submitted on the pleadings, interrogatories and answers thereto, affidavits, exhibits and briefs of the parties. The Court, being duly advised in the premises, now submits its ruling:

The matter is before the Court on the complaint of the plaintiff, Southern Railway Company, against the defendant, Mead Johnson & Company, for underpayment of freight charges on certain shipments of "milk food liquid" from Evansville, Indiana, to Oak Tree, New Jersey, be-

tween the months of January, 1978 and April, 1980. The parties agree that the facts stated by the plaintiff and the amount in question are uncontested except for the plaintiff's "implication" that the route specification was solely at the option and desire of defendant, Mead Johnson & Company. The parties each supported their legal and factual position with excellent briefs. The Court, being duly advised on the premises, now finds that there is a genuine issue of material fact herein and that summary judgment must be denied.

The Court further finds that the defendant has submitted the affidavit of Marilyn Scales, freight consolidator and rate clerk of Mead Johnson & Company, during all times herein and which state facts concerning the desire and intention of defendant to maintain the lowest available rate for rail shipments between the points in question regardless of the routes available. That defendant had no preference as to routing but was solely concerned with the lowest rate. The Court finds the assertion to be a material fact herein, which, if proved, could affect the outcome of plaintiff's cause of action. That such assertion is disputed by plaintiff, thus, creating a genuine issue of material fact.

Pursuant to Rule 56(d), the Court makes the following findings of fact based upon the parties' statements of uncontested facts:

FINDINGS OF FACT

1. Plaintiff is a corporation organized and existing under the laws of the Commonwealth of Virginia, and having its principal offices and place of business in the City of Washington, District of Columbia.

2. Plaintiff is a common carrier of goods by rail operating in interstate commerce at rates set by the applicable tariffs filed with that agency.

3. Defendant is a corporation organized and existing under the laws of the State of Delaware, and having its principal offices and place of business in the City of Evansville, Indiana.

4. On the various dates between January 3, 1978 and April 11, 1980, set forth in the schedule attached to plaintiff's complaint filed herein, marked "Exhibit A" thereon, and incorporated therein by reference thereto, defendant tendered to plaintiff for shipment by rail in interstate commerce between Evansville, Indiana and Oak Tree, New Jersey, certain goods which constituted "canned, preserved or prepared foodstuffs" within the meaning of the applicable tariff, the Eastern Canned Goods Tariff Freight Tariff E-679-E (1977).

5. The tariffs attached to the Affidavit of Patrick J. Glennon, Commerce Officer, which affidavit is attached hereto, marked "Exhibit B", and by reference thereto, incorporated herein, are true and correct copies of the tariffs specified by Freight Tariff E-697-E, and such tariffs were in effect at all times material.

6. Freight Tariff E-697-E provides in Item 1000, routing instructions located at CTRTB Routing Tariff 662-A, I.C.C. 4595 (Hinsch Series), and TL-CTRB Routing Tariff E/W 663-F, I.C.C.C.-563.

7. Freight Tariff 662-A outlines further instructions that the tariff user must follow in determining applicable routes. (See page 5 of Appendix IV to Glennon Affidavit.) The route specified on pages 104-106 of Tariff 662-A

specifies the applicable tariffs to be found by reference to Route Guide CR 5000. (See Appendix V to Glennon Affidavit.)

8. Reference to the tariffs specified in the affidavit of Glennon specify the applicable charges to be applied pursuant to tariff.

9. That the amount of undercharges indicated for the shipments upon the "Exhibit A" attached to plaintiff's complaint filed herein, and by reference thereto, incorporated herein, would be after adjustments specified in defendant's answers to interrogatories for the period April 14, 1978 through and including October, 1979, the sum of Twenty-Six Thousand Three Hundred Thirteen Dollars Fifty-Five Cents ($26,313.55).

This cause shall proceed to trial on the contested issues only.

Dated this 28th day of October, 1982.

/s/ J. Patrick Endsley
Magistrate
United States District Court
Southern District of Indiana

MEMORANDUM

The defendant has raised a material issue of fact, to-wit: Whether the plaintiff, Railway, has misrouted the shipments by instructing the defendant, Mead Johnson, that the same rate was available for the "Southern Railway" as for the "L & N" route as defined by the

briefs, and that the rate and not the route was the primary concern of the shipper and that such defense, if proven, could defeat the right of the plaintiff to recover herein. See, *Johnson Machine Works, Inc. v. Chicago, Burlington and Quincy Railroad Company*, 297 F.2d 793 (8th Cir. 1962) and as distinguished in *Consolidated Freightways Corporation of Delaware v. Forty-Eight Insulations, Inc.*, 501 F.2d 1400 (7th Cir. 1974).

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Moutoux v. Gulling Auto Electric, Inc., 295 F.2d 573 (7th Cir. 1961).

Clearly, Fed.R.Civ.P. 56 requires more than persuasive evidence. As a practical matter, the rule requires the absence of evidence to the contrary of the movant's evidence. In summary judgment procedure, it is not the province of the trial court to weigh the evidence of one par-

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY,

Plaintiff,

No. EV 80-254-C vs.

MEAD-JOHNSON & COMPANY,

Defendant.

and

SOUTHERN RAILWAY COMPANY,

Plaintiff,

No. EV 81-77-C vs.

MEAD-JOHNSON & COMPANY,

Defendant.

JUDGMENT

This consolidated cause, having come on for trial to the Court without the intervention of a jury on November 30, 1982, on the plaintiffs' complaint and defendant's answer thereto, and the Court having heard the testimony and having received documentary evidence, and, the Court having considered the evidence presented by the parties and having entered its Findings of Fact and Conclusions of Law which are in the following words and figures:

(H. I.)

IT IS, THEREFORE, ADJUDGED that the plaintiff, Louisville and Nashville Railroad Company, have of and recover from the defendant, Mead Johnson & Company, the sum of Eighty-Seven Thousand Two Hundred Eighty Dollars and Twenty-Four Cents ($87,280.24), with interest thereon as provided by law and costs to be taxed in favor of plaintiff and against defendant as provided in 28 U.S.C. §1920.

IT IS FURTHER ADJUDGED that the plaintiff, Southern Railway Company, have of and recover from the defendant, Mead Johnson & Company, the sum of Twenty-Six Thousand Three Hundred Thirteen Dollars and Fifty-Five Cents ($26,313.55) with interest thereon as provided by law and costs to be taxed in favor of plaintiff and against defendant as provided in 28 U.S.C. §1920.

Dated this 8th day of March, 1983.

/s/ J. Patrick Endsley
Magistrate
United States District Court
Southern District of Indiana

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